EQUITY JURISDICTION—SPECIFIC PERFORMANCE—MUTUALITY —The defence of "lack of mutuality" in a suit for the specific performance of a contract has given considerable trouble to the courts of equity and has been the subject of much discussion and considerable comment, mostly adverse, on the part of text-writers and students of the law.[1] In the words of the late Professor James Barr Ames, the doctrine, briefly, is as follows: "Equity will not compel specific performance by a defendant if after performance, the common law remedy of damages would be his sole security for the performance of the plaintiff's side of the contract."[2]

The question has presented itself in many different aspects and many exceptions have arisen which have come to be as well settled as the rule itself. One of the earliest of these is that which grants specific performance at the instance of a party not originally bound by a contract within the Statute of Frauds because he did not sign the memorandum, against another who did sign it, on the theory that by resorting to a suit for specific performance, the party who did not sign thereby adopts the agreement and renders it obligatory upon himself.[3]

The courts are uniform in enforcing a contract made with an infant if he is in court asking the chancellor to act. This proceeds on the same theory.[4] Curiously enough, there is not such a uniformity in regard to similar contracts made with a *feme covert*, but the weight of opinion is that equitable relief should be granted.[5]

There is a decided split as to the problem of when a contract should be examined for mutuality. Most courts hold that if at the time of the litigation, the contract is enforceable by both parties, relief should be granted, but there is a strong minority, supported chiefly by the federal decisions, which maintain that a contract not mutual at the outset is unenforceable specifically in equity. This

---

[1] See the exhaustive article of Professor Wm. Draper Lewis in 40 AM. LAW REG. 387, 393. See also article of H. C. McClintock, Esq., in 58 UNIV. OF PENNA. LAW REV. 16, and the article of the late Professor James Barr Ames, in 3 COL. LAW REV. 1.

[2] See 3 COL. LAW REV. 1.

[3] See the early case of Hatton v. Gray, 2 Cases in Chancery, 164 (Eng. 1684). See also Sylvester v. Barn, 132 Pa. 467 (1890); Kroh v. Wassner, 75 N. J. Eq. 109 (1908); cases collected and cited in Ames' "Cases on Equity Jurisdiction", p. 421, n.; and cases cited in the note to Western Timber Co. v. Kalama Lumber Co., 6 L. R. A. (N. S.) 397.

[4] Fliglit v. Bolland, 4 Russell, 299 (Eng. 1828). See also cases cited in Ames' Cases, p. 423, n.

[5] Fennelly v. Anderson, 1 Irish Chancery Reports, 706 (1851); Armstrong v. Maryland Coal Co., 67 W. Va. 591 (1910). See, *contra*, Gage v. Cummings, 209 Ill. 120 (1904), and adverse criticism and cases cited therein in Fry: "Specific Performance" (3rd Ed.), p. 217.

problem is well illustrated by those contracts which call for the sale of land not at the time the property of the vendor, but which is subsequently acquired by him. The majority view is that want of title at the time of the contract is no defense if the plaintiff can give title at the time of the decree,[6] but the federal courts are committed to the opposite doctrine. The force of the leading case, however,[7] has been somewhat broken by a later decision of the same court,[8] where it is held that the rule denying specific performance does not apply if the vendee is honestly informed at the time the contract is made that the vendor does not have title to the property but has reasonable expectation of securing it before the time set for the actual conveyance.

The problem has also arisen in cases involving contracts for personal services. One view is that since the party contracting to render the services can not be compelled to perform, he likewise should be made to seek his remedy at law, though he be in court, ready and willing to perform his part of the agreement,[9] but the modern attitude seems to be that the question of compelling performance on the part of the plaintiff, should he refuse, should not be anticipated and that he should be entitled to a decree.[10] Of course the doctrine of mutuality is obviously not applicable to unilateral contracts.[11]

But options have given the courts the most trouble in this respect. The right to demand specific performance of a lessor's contract to renew a lease at the option of the lessee is well established, since the courts were familiar with this sort of contract long before the doctrine of mutuality arose.[12] Moreover, the courts invariably hold that if there is any consideration, however slight, for an option to buy or sell land, specific performance should not be

---

[6] Musselman's Appeal, 65 Pa. 480 (1870); Armstrong v. Maryland Coal Co., *supra*, n. 5.

[7] Norris v. Fox, 45 Fed. Rep. 406 (1891).

[8] Day v. Mountin, 137 Fed. Rep. 756 (1905).

[9] Hills v. Croll, 2 Phillips, 60 (Eng. 1845). See also cases cited in voluminous note in Ames' Cases, p. 428.

[10] Singer Co. v. Buttonhole Co., Holmes, 253 (U. S. Cir. Ct. 1873); Butterick Pattern Co. v. Rose, 141 Wis. 533 (1910).

[11] Howe v. Watson, 60 N. E. Rep. 415 (Mass. 1901). See also Ames' Cases, p. 430, n.

[12] McCormick v. Stephany, 57 N. J. Eq. 257 (1898). For a full collection of the numerous English and Irish decisions, see article by Professor Lewis, *supra*, n. 1. For the American cases, which are few in number, see Ames' Cases, p. 432, n.

denied.[13] But the contract which provides for a lease with the option in the lessee to terminate it at will or upon short-time notice, is the rock upon which the cases split. The majority view is that such a clause does not present an unsurmountable obstacle in the way of a decree of specific performance and the decisions, which are numerous, are well illustrated by the so-called "base-ball cases."[14] The minority view, on the other hand, is supported by a strong line of cases, though the jurisdictions which have adopted it are few. This theory is that a defendant should not be compelled to make a lease or perform a contract which he could not enforce, but which the lessee or promisee, the very person who is asking the court to act, may terminate at his desire. This principle was applied in Michigan, in a case involving a contract to lease mining lands with a clause enabling the lessees to terminate upon thirty days' notice,[15] but this decision had such an injurious effect upon the development of the mineral wealth of the State that the legislature in the following year gave to the holder of an option in such a lease an absolute right to specific performance in chancery despite the clause of surrender contained therein.[16] The doctrine is still enforced in Illinois, however,[17] and it has been regarded always as the rule of the federal courts. The leading case turned upon a contract whereby one party agreed to cut and deliver all the marble the other party could use, the latter agreeing to take it all, but with the power to terminate the arrangement upon a year's notice. The court refused specific performance.[18] Though there is ground, from the very nature of the case, for reasonable doubt as to whether this decision is not mere *obiter dicta,* and though there are apparently no decisions in the same court which squarely support it in all its force,[19] it has been cited universally as announcing the rule of the federal courts.[20]

In this connection it is interesting to note a recent decision of the United States Supreme Court, in which this problem is discussed by Mr. Justice Van Devanter.[21] An oil and gas lease to be

---

[13] Ross v. Parks, 93 Ala. 153 (1890); O'Brien v. Boland, 166 Mass. 481 (1896); Corbett v. Cronkhite, 239 Ill. 9 (1909); Schaeffer v. Herman, 237 Pa. 86 (1912). See, *contra,* Graybill v. Bugh, 89 Va. 895 (1893), overruled in Watkins v. Robertson, 105 Va. 269 (1906). See also Ames' Cases, p. 432, n.

[14] See Phila. Ball Club v. Lajoie, 202 Pa. 210 (1902), and cases cited therein by Potter, J.

[15] Rust v. Conrad, 47 Mich. 449 (1882).

[16] See Grumett v. Gingrass, 77 Mich. 369, 388 (1889).

[17] Ubrey v. Keith, 237 Ill. 284 (1908).

[18] Marble Co. v. Ripley, 10 Wall. 339 (1870).

[19] The question was not squarely met by the Court of Appeals in the recent case of Weegham v. Killefer, 215 Fed. Rep. 168 (1914), the last "base-ball" case of importance in the federal courts.

[20] See Federal Oil Co. v. Western Oil Co., 112 Fed. Rep. 373 (1902).

[21] Guffey v. Smith, 237 U. S. 101 (1915).

valid as long as oil and gas were found on the land gave the lessees the option to surrender it at any time upon the payment of one dollar, after which "all payments and liabilities thereafter to accrue should cease and determine." The lessor gave a subsequent lease of the same premises to the defendant's assignors, who took with notice of the prior lease. The complainants, assignees of the lessees under the first lease, brought a bill in equity to enjoin operations under the latter lease and to obtain a discovery and an accounting in respect of the oil and gas produced and sold in the course of operations already had. The court decreed accordingly.

The basis upon which the decision is founded is aside from the real problem and the court avoided the necessity of directly dealing with the earlier federal cases on the subject. It found that such a lease passes a "present vested right—'a freehold interest'—in the premises, taxable as real property" and the court dwelt on this fact and upon the fact that under the laws of Illinois, in which State the cause of action arose, the holder of such a lease may not bring an action of ejectment thereon. The point was also made that any action at law for damages would be clearly inadequate. The court distinguished the cases of contracts containing an option of surrender on the ground that the case in question was not a case involving the specific performance of an executory contract to give a lease or even the enforcement of an executory promise in a lease already given, but rather one "to protect a present vested leasehold, amounting to a freehold interest, from the continuing and irreparable injury calculated to accomplish its practical destruction." In the words of Mr. Justice Van Devanter, "The complaint is not that performance of some promised act is being withheld or refused, but that the complainants' vested freehold right is being wrongfully violated and impaired in a way which calls for preventive relief." The court even held that "in a practical sense" the suit was one to prevent waste.

While the views of the learned justice are no doubt of great weight and importance, it is submitted that the decision in effect curtails the force of the earlier decisions on the subject, despite the effort to distinguish the two situations. It is difficult to understand the decree in any light other than that of a direct enforcement of rights under such a contract, if not of the very contract itself, which had previously been declared unenforceable repeatedly, and this is the more apparent in the principal case in view of the fact that the original lessor, who gave the option, was made a defendant in the suit. Surely this is enforcing the contract as to him, negatively at least.

But perhaps it is not too ambitious to suggest that the Supreme Court has come to the point where it realizes that its former position is not in accord with the modern trend of authority. In this light the case in question might well be an indication of a complete

reversal in the future. Indeed the court admitted that the rule formerly adhered to is "restrained by many exceptions," and has been "the subject of divergent opinions on the part of jurists and text-writers."

It is submitted that the majority view is logically sound and practically almost a necessity, though the federal doctrine is perhaps theoretically the better. While under such a contract it might be truthfully said that there is not true mutuality of right, there is mutuality of remedy, in that the party holding the option is ready and willing to perform and the question of compelling him to do so should not be considered until it arises.

It is submitted that the court in the principal case could hardly have been criticized had it squarely abandoned the earlier position of the federal courts.

*L. B. S.*